13/12/07

HIGH COURT OF CHHATTISGARH, BILASPUR

Single Bench: Hon'ble Shri Dilip Raosaheb Deshmukh, J.

Misc. Appeal (C) No. 197 of 2007

Appellant Applicant	:		Mohan Lal Patel, aged 40 yrs, S/o Shri Rajaram Patel, r/o Near Rajabada, Mangala Post-Mangala Distt.-Bilaspur CG.
			VERSUS
Respondents Non-applicants	:	1.	Shri Jay Kumar Yadav, aged 27 yrs S/o Shri Bisouha Yadav, r/o Gram-Mohada, Thana-Hirri, Tah-Bilha Distt-Bilaspur CG
	:	2.	Shri Santosh Kumar Sannad, aged 35 yrs s/o Shri I.P. Sannad, r/o Imlipara : Near Telephone Exchange Road, Distt – Bilaspur CG
	:	3.	The New India Insurance Company Ltd. Through : Branch Manager, The New India Insurance Company Ltd : Branch-Bilaspur , Near Rajendra Nagar Chouck, Bilaspur CG.

Appeal for Enchancement of Award under section 173 of Motor Vehicle Act, 1988

Present:
Shri Anurag Dayal Shrivastava, counsel for the appellant..
Shri Ravi Ranjan Sinha, counsel for respondents No. 1 & 2.
Shri Dashrath Gupta, counsel for respondent No.3.

ORAL ORDER
(Passed on 11.12.2007)

Heard finally.

2. Shri Anurag Dayal Shrivastava, learned counsel for the appellant submitted at the very outset that he would assail the impugned award dated 4th October, 2006 passed by the 1st Additional Motor Accidents Claims Tribunal, Bilaspur (C.G.) (henceforth, the Tribunal) in claim case No. 20/2006 awarding compensation of Rs.1,62,500/- on the sole ground that the Tribunal erred in deducting a sum of Rs.54,500/- towards 25% contributory negligence on the part of the appellant.

3. Brief undisputed facts are that on 29th July, 2005 at about 10.15 a.m. the appellant/claimant was riding on his motor cycle towards Belha. One Sanjay Bajpai was the pillior rider. Near Jarhabhata, Mandir Chowk, a truck No.CG-ZB-2074 which was driven by respondent No.1, owned by respondent No.2 and insured by respondent No.3, was going ahead. On the right side of the truck as also the motor cycle, there was a divider on the road. It is alleged that the appellant/claimant asked for side by playing horn and the respondent No.1 waived his hand by giving side. The appellant/claimant entered the narrow crevice in between the truck and the divider in a bid to overtake the truck, stumbled and collided against the rear of truck and as a result of which sustained grievous injuries.

4. The driver and the owner filed their written statement but led no evidence. The respondent No.3/insurance company raised a plea of contributory negligence but adduced no evidence. The Tribunal on the basis of the admission by the appellant/claimant in paragraphs No.3 and 15 of his testimony, recorded a finding that the appellant/claimant had contributed to the accident and on this basis reduced the compensation of Rs. 2,18,000/- by deducting a sum of Rs.54,500/- being equivalent to 25% towards contributory negligence of the appellant/claimant and awarded a sum of Rs. 1,63,500.00 as compensation.

5. Shri Anurag Dayal Shrivastava, learned counsel for the appellant placed reliance on ***General Manager, M.P. State Road Transport Corporation, Bhopal and others*** **vs.** ***Smt. Vimla and others,*** **1999 (1) T.A.C. 306 (Raj.),** ***Laxmi and Company*** **vs.** ***Savitri Devi Agarwal (Loyalka) and others,*** **1990 ACJ 450,** ***Pankajbhai Chandubhai Patel*** **vs.** ***Bharat Transport Corporation and another,*** **1998 (1) T.A.C. 883 (Guj.)** and ***Pramodkumar Rasikbhai Jhaveri*** **vs.** ***Karmasey Kunvargi Tak and others,*** **AIR 2002 SC 2864** and argued that the Tribunal erred in deducting a sum of Rs.54,500/- towards contributory negligence of the appellant/claimant because neither the insurer nor the driver and the owner of the truck adduced any evidence to prove contributory negligence and the Tribunal did not frame an issue on contributory negligence.

6. On the other hand, Shri Ravi Ranjan Sinha, learned counsel for the respondents No.1 & 2 urged that the admission by the appellant/claimant in paragraphs 3 and 15 of his cross-examination left no room for any doubt that

there was no space for overtaking the truck in view of the divider on the right side and not more than one heavy vehicle could occupy the road. In this view of the matter, the Tribunal was wholly justified in taking into consideration the admissions and recording a finding that the appellant/claimant had contributed to the accident.

7. Shri Dashrath Gupta, learned counsel for respondent No.3/insurance company placed reliance on ***Ansar Ahmad* vs. *Qamar Khan,* [2006 (1) M.P.W.N. Short Note No. 89]** and submitted that the insurance company had raised the specific plea of contributory negligence. Since the parties were well aware of the pleadings and the appellant was cross-examined, the Tribunal was wholly justified in taking note of the facts on the principles of *res ipsa loquitor* and holding that the appellant/claimant contributed to the accident.

8. Having considered the rival submissions, I have perused the record. The claimant has admitted in paragraph 3 that at the place of occurrence on the right side of the road there was a divider and the road could occupy only one heavy vehicle. It was further admitted by the appellant/claimant that he could not overtake the truck and was perhaps hit by the rear of truck. I am of the considered opinion that the absence of an issue on the question of contributory negligence, in the facts and circumstances, does not vitiate the finding of contributory negligence recorded by the Tribunal. Since the insurer had specifically pleaded contributory negligence and had cross-examined the claimant, the Tribunal was wholly justified in taking note of the fact situation and drawing an inference of contributory negligence against the appellant/claimant. The doctrine of *res ipsa loquitor* also comes into play because the undisputed facts speak for themselves that the heavy vehicle i.e. truck already going ahead while occupying the road in its totality and the divider being located on the right side of the road there was hardly any space for the motor cycle to creep in and overtake the truck. Despite this, the appellant/claimant took the risk in overtaking the truck. It is also noteworthy that the appellant/claimant did not cross the truck but collided with its rear while attempting to overtake. There is no element of doubt that the appellant/claimant had a lions share in the accident. In this manner, I am of the considered opinion that the appellant/claimant was extremely fortunate in getting away with a deduction only of Rs.54,500/-

towards 25% contributory negligence of the claimant because I do not visualize any negligence at all on the part of the driver of the truck, who in no manner was responsible for the accident. However, since the respondents No.1 & 2 or the insurance company/respondent No.3 have not preferred any appeal, there is no need to dwell any further upon this issue. The case law cited by the learned counsel for the appellant/claimant being clearly distinguishable on facts does not help the appellant in any manner. I am of the considered opinion that the award passed by the learned Tribunal does not call for any interference

9. The appeal being devoid of merit is accordingly dismissed.

Sd/-
Dilip Raosaheb Deshmukh
Judge

Anjani